the BIA subsequently denied his motion to reconsider. Petitioner, the government and the Seventh Circuit all agreed that this Court's decision in *INS v. Stone* was applicable in having jurisdiction to determine Udarbe's appeal.

Since this Court's decision in *Stone*, the 104th Congress in 1996, however, passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). Since the enactment of that law, immigration law in the United States has changed dramatically, and several Circuits, including the Ninth Circuit, have ruled that motions like the one Udarbe filed have changed since the passage of IIRAIRA, specifically that they now take on statutory rather than constitutional framework.

SUMMARY OF ARGUMENT

This Court should vacate the Seventh Circuit's order below and direct the Seventh Circuit to exercise jurisdiction over Mr. Udarbe's petition for review and vacate the removal order in this matter. The Court should take this action because 8 U.S.C. § 1101(a)(43) violates the equal protection principles embodied in the Fifth Amendment of the Constitution. As applied, it treats a legal permanent resident (LPR) convicted of an "aggravated felony" in Indiana differently than it treats a legal permanent resident convicted of an "aggravated felony" in Illinois. An LPR convicted under a misdemeanor offense of battery in the State of Indiana, is an aggravated felony under 8 U.S.C. § 1101(a)(43) and he would be subject to removal by the Department of Homeland Security ("DHS" formerly INS). However, an LPR convicted for the same

actions under a misdemeanor offense of battery in the state of Illinois would not be an "aggravated felony" under 8 U.S.C. § 1101(a)(43) and he would not be subject to removal by the DHS.

Lastly, a LPR is placed in deportation proceedings if he is convicted of an aggravated felony. 8 U.S.C. § 1227(a)(2)(iii) (2004). However, the same is not true for a non-legal permanent resident (non-LPR) convicted of an aggravated felony. A non-LPR aggravated felon may seek an adjustment of status and remain in the United States by receiving an INA § 212(h) discretionary waiver. 8 U.S.C. § 1182(h) (2004).

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) clearly bars discretionary cancellations of deportation to lawful permanent residents convicted of aggravated felonies while permitting these discretionary waivers for illegal aliens convicted of the same underlying offenses. This disparate treatment of similarly situated individuals violates the due process clause of the Fifth Amendment on equal protection grounds.

Without question, the timely filing of a petition for review is a mandatory prerequisite to a circuit court's exercise of jurisdiction. In *Stone v. INS*, 514 U.S. 386 (1995), this Court held that pending motions for reconsideration do not toll the finality of a BIA deportation order. *Id.* at 405. In so holding, it also stated that motions for reconsideration are separate, final agency orders, and indicated that the proper procedure for appealing both a deportation order and a subsequent denial of a motion for reconsideration is to file two separate petitions for review which may be consolidated for review. *See id.* at 395

("Upon denial of reconsideration, the petitioner would file a separate petition to review that second final order."). Because petitioner here did file a petition for review within the prescribed time after the BIA's disposition of his motion for reconsideration, despite not filing a petition for review of the BIA order dismissing Udarbe's immigration appeal, the Seventh Circuit Court nevertheless could have reviewed his arguments. Moreover, since the 104th Congress in 1996 passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), motions to reconsider no longer are regulatory in nature, but statutory. As the nature of such motions have changed, so too, does the effect of said motion change and therefore the reviewing authority of the court has changed by act of Congress. Stone should only apply to pre-IIRAIRA cases, not cases wherein the legal effect of motions to reopen fall within the scope of IIRAIRA. With the enactment of IIRIRA, motions to reopen and reconsider were transformed from a regulatory to a statutory form of relief and Petitioner's timely filed motion for reconsideration was reviewable by the Seventh Circuit Court of Appeals. Finally, the Seventh Circuit failed to discuss whether Petitioner enjoyed certain rights of equitable tolling of the issue raised in his motion to reconsider before it denied his petition for review on jurisdiction reasons. Other circuits have ruled that non-citizens like Udarbe enjoy the right of review before the court of appeals.

For all of these reasons, petitioner respectfully requests this Court to vacate the order of the Seventh Circuit and to direct the Seventh Circuit to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

I.

ARGUMENT

THE DISPARATE TREATMENT OF PETITIONER FROM OTHERS SIMILARLY SITUATED VIOLATES THE EQUAL PROTECTION PRINCIPLES EMBODIED IN THE FIFTH AMENDMENT, IN THAT 18 U.S.C. § 16 CAN BE USED TO REMOVE A NON-CITIZEN CONVICTED OF A CRIME IN ONE STATE BUT NOT IN ANOTHER STATE CONVICTED OF THE SAME CRIME

Despite a strong national policy in favor of uniform application of the immigration laws, someone who is not a U.S. citizen is removable for a misdemeanor conviction in one state but is not subject to deportation and removal in another state for the same offense.

The due process clause of the Fifth Amendment guarantees every person the equal protection of the laws. *Hampton v. Mow Sun Wong*, 96 S. Ct. 1895, 1904 (1976). The federal sovereign, like the States, must govern impartially. *Id.* The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. *Id.* Although both Amendments require the same type of analysis, the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment which applies to the states. However, the concept of equal protection and due process both stem from the American ideal of fairness. *Bolling v. Sharpe*, 74 S. Ct. 693, 694 (1954).

Essentially, the concepts of due process and equal protection are premised on the fact that all persons similarly

situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed.2d 786 (1982).

What is relevant here is Petitioner's substantive due process. Substantive due process bars certain arbitrary government actions regardless of the fairness of the procedure used to implement them. *Danieals v. Williams*, 106 S. Ct. 677, 678 (U.S. 1986). The usual standard of review for a statute or regulation challenged on equal protection grounds is the rational basis test. Under this test, legislation is presumed to be valid, and will be sustained as long as the classification drawn by the statute is rationally related to a legitimate state interest. *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 675 (7th Cir. 1987). Citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *see Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S. Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *Vaden v. Village of Maywood*, 809 F.2d 361, 365 (7th Cir. 1987). As such, both 8 U.S.C. § 1101(a)(43) and 8 U.S.C. § 1182(h) (2004) violate the equal protection principles embodied in the Fifth Amendment by disparate treatment of similarly situated persons.

A. Petitioner Is Being Treated Differently Under 8 U.S.C. § 1101(a)(43) In Indiana Than A Similarly Situated Person, Convicted Of The Same Crime In Illinois.

The terms of imprisonment for misdemeanor battery conviction vary from state to state. For example, the maximum term of imprisonment for a misdemeanor conviction for the offense of battery in Indiana is one year; while in Illinois the maximum term of imprisonment for a misdemeanor conviction for the offense of battery is 364

days. *See* Illinois Code § 5-1-14 (2004) (Imprisonment of less than one year for a misdemeanor battery) Indiana Code § 35-50-3-2 (2004) (Imprisonment of not more than one year for a misdemeanor battery).

If the Petitioner were convicted for the same actions under a misdemeanor offense of battery in the State of Illinois and received the maximum sentence, as he did in the State of Indiana, his conviction would not be an aggravated felony under 8 U.S.C. § 1101(a)(43) and he would not be subject to removal by the INS.

To survive substantive due process analysis, a regulation need "bear a rational relation to a legitimate government interest . . . " *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 675 (7th Cir. 1987). *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 464-65, 99 L.Ed. 563 (1955). There can be no reasonably conceivable state of facts or any plausible reason that could provide a rational basis for the Agency to treat a person convicted of misdemeanor battery in the State of Indiana differently than a person convicted of misdemeanor battery in the State of Illinois. Because 8 U.S.C. § 1101(a)(43) allows the unequal treatment for the same course of conduct from one state to another, without a rational basis for such unequal treatment, that code violates Petitioner's right to equal protection under the due process clause of the Fifth Amendment of the United States Constitution.

The equal protection violation is further exasperated by the fact that both Indiana and Illinois are Seventh Circuit jurisdictions. Thus, even within the Seventh Circuit, similarly situated individuals that commit identical crimes would be treated differently under 8 U.S.C. § 1101(a)(43). A thorough review of the code, legislative

history, and ensuing case law found there to be no rational relation to a legitimate government interest in treating legal permanent residents in Indiana differently than treating legal permanent residents in Illinois. Furthermore, it is important to reiterate that substantive due process bars certain arbitrary government actions regardless of the fairness of the procedure used to implement them. *Danieals v. Williams*, 106 S. Ct. 677, 678 (U.S. 1986).

In conclusion, even though 8 U.S.C. § 1101(a)(43) may be implemented fairly, the net result is an arbitrary treatment of lawful permanent residents depending on the state in which they committed a misdemeanor. Plainly stated, the luck of the draw determines whether they will be deported or allowed to remain in the United States.

B. The Disparate Treatment Of Legal Permanent Resident Aggravated Felons As Against Non-Legal Permanent Resident Aggravated Felons Violates The Due Process Clause Of The Fifth Amendment On Equal Protection Grounds.

A lawful permanent resident (LPR) is placed in deportation proceedings if he is convicted of an aggravated felony. 8 U.S.C. § 1227(a)(2)(iii) (2004). The LPR has not recourse for remaining in the United States. However, the same is not true for a non-legal permanent resident (non-LPR) convicted of an aggravated felony. The non-LPR may seek an adjustment of status and remain in the United States by receiving a 212(h) discretionary waiver. 8 U.S.C. § 1182(h) (2004).

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) clearly bars discretionary cancellations of deportation to LPRs convicted of aggravated felonies while permitting these discretionary waivers for illegal aliens convicted of the same underlying offenses. *See Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001). This disparate treatment of similarly situated individuals violates the due process clause of the Fifth Amendment on equal protection grounds.

Congress' plenary power in the area of immigration and naturalization law requires special deference be given in decisions to expel or exclude individuals from this country. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). A classification must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Although Petitioner is entitled to equal protection under the Fifth Amendment, such congressional distinctions among aliens are subject only to rational review. *See Fiallo*, 430 U.S. at 792. Rational review requires that a statute be upheld if there are plausible reasons for Congress' action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

There is no rational basis for such a disparity of treatment between similarly-situated LPRs and non-LPRs and therefore INA § 212(h) is unconstitutional and must be struck down.

The Seventh Circuit has previously visited this issue in *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001). The Court in *Lara-Ruiz* gave three reasons for the distinction between LPR aggravated felons and non-LPR aggravated felons to be a rational classification. First, it claimed that

the amendment to INA § 212(h) fulfilled Congress' overall purpose in IIRIRA to streamline the removal process and expedite the removal of criminal aliens. *Id.* at 947. It is clear that streamlining the removal process is a legitimate government purpose; however the constitution additionally requires that the law must be rationally related to the achievement of that purpose. There is no rational link between the asserted goals of streamlining the removal process and Congress' actions in denying discretionary waivers only to LPRs. The *Lara-Ruiz* opinion completely lacks reason rewarding those that have committed two crimes, illegal entry and 'aggravated felony', by treating them better than individuals guilty only of the same 'aggravated felony'.

In addition, the Court in *Lara-Ruiz* stated that even if Section 212(h) does not streamline the removal process, it is a rational first step toward the expeditious removal of all criminal aliens. *Id.* at 947, stating:

> [w]hile it might have been wiser, fairer, and more efficacious for Congress to have eliminated § 212(h) relief for non-LPR aggravated felons as well, the step taken by Congress was a rational first step toward achieving the legitimate goal of quickly removing aliens who commit certain serious crimes from the country. . . .

Id.

The distinction which Congress enacts in order to advance this "first step," however, must itself bear a rational relationship to a legitimate government purpose. *See Brown v. Bowen*, 905 F.2d 632, 637 (2d Cir. 1990). Petitioner asserts that there is no rational relationship. A rational "first step" would have been for Congress to

preclude only LPRs and non-LPRs who committed certain felonies, but allowed felons who committed other, perhaps less serious crimes to remain eligible for discretionary relief. "This would bear a rational relationship to an initial goal of removing the worst criminal aliens from the country in furtherance of a latter goal of expediting the removal of all criminal aliens". *See Jankowski v. I.N.S.*, 138 F.Supp.2d 269 (D.Conn. 2001).

Instead congress chose to punish LPRs guilty of an aggravated felony to a higher degree than illegal aliens guilty of the same aggravated felony. There is not even a scintilla of reason applicable to making that the "first step" toward the expeditious removal of all criminal aliens. Rather, the rational and logical first step should be to remove the alien that has two strikes against him (illegal entry and aggravated felony) before the alien that has only one (an aggravated felony).

Lastly, this Court in *Lara-Ruiz* stated that Congress may have decided to take an unprecedented step of giving preference to illegal aliens over lawful permanent residents, stating:

> LPRs enjoy rights and privileges by virtue of their status which are not shared by non-LPRs, and they typically have closer and longer-standing ties to the United States through employment and family relationships. Therefore, Congress may rationally have concluded that LPRs, who commit serious crimes despite these factors, are uniquely poor candidates for relief from removal through the 'backdoor' of waiver of inadmissibility. *Lara-Ruiz*, 241 F.3d at 947.

It is incredible that this Court must reconcile whether a lawful resident with longer-standing ties to the United

States, through employment and family relationships is somehow less deserving of waiver inadmissibility than an illegal alien with less ties to this country.

It is flatly irrational for Congress to punish those who adhere to the immigration laws of his country while offering rewards to those who have entered and/or remain here illegally. INA § 212(h) fails to meet the minimum standards or rational basis scrutiny and as such must be struck down.

II.

ARGUMENT

THE ENACTMENT OF IIRAIRA NOW CREATES A STATUTORY RATHER THAN ADMINISTRATIVE RIGHT IN ALIENS SEEKING REDRESS THROUGH MOTIONS TO REOPEN UNDER 8 C.F.R. § 1003, AND AS SUCH THIS COURT'S HOLDING IN *STONE V. INS* SHOULD NO LONGER BE APPLICABLE

Congress has vested the federal courts of appeal with jurisdiction to review appeals from BIA orders denying motions for reconsideration. *New Orleans Pub. Serv. Inc. v. Counsel of New Orleans*, 491 U.S. 350, 358 (1989). The court of appeals are duty-bound to exercise that jurisdiction. *Id.* This Court in *Stone*, however, held that pending motions for reconsideration do not toll the finality of a BIA deportation order. *Id.* at 405. This Court has held that the BIA's denial of an appeal and its denial of a motion to reconsider are two separate final orders, each of which require their own petitions for review. *Stone v. INS*, 514 U.S. 386, 394 (1995). Although not directly reviewing the BIA's order, a review of the motion to reconsider may

require an evaluation of that order. *Stone v. INS*, 514 U.S. 386, 405 (1995).

A non-citizen in removal proceedings may also seek relief from a decision of an immigration judge or the BIA by filing a motion to reconsider. Despite the decision of the Seventh Circuit in this case, other circuits have clearly held that the "purpose of a motion to reconsider is not to raise new facts, but rather to demonstrate that the IJ or the BIA erred as a matter of law or fact". *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001), citing INA § 240(c)(5)(C), 8 U.S.C. § 1229a(c)(5)(C); 8 C.F.R. § 3.2(b)(1) (governing motions to reconsider before the BIA); 8 C.F.R. § 3.23(b)(2) (governing motions to reconsider before the IJ). That court further stated that an alien must file a motion to reconsider within thirty days of the IJ's or the BIA's decision to be reviewable via a petition for review. INA § 240(c)(5)(B), 8 U.S.C. § 1229a(c)(5)(B); 8 C.F.R. § 3.2(b)(2); 8 C.F.R. § 3.23(b)(1). The Petitioner here did just that.

The Seventh Circuit also failed to address whether Udarbe enjoyed equitable tolling of his issues in his motion for reconsideration.[1]

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[1] While not asserted by petitioner, some courts have held that both equitable tolling and equitable estoppel can be used to "stop a limitations period from continuing to run after it has already begun to run." *Gardenhire v. IRS*, 220 B.R. 376, 382 (B.A.P. 9th Cir. 1998), *rev'd on other grounds*, 209 F.3d 1145 (9th Cir. 2000). Tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant," estoppel "focuses on the actions of the defendant." *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981); see also *Lehman v. United States*, 154 F.3d 1010, 1015-17 (9th Cir. 1998) (discussing both theories), *cert. denied*, 526 U.S. 1040 (1999); *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990) ("[E]quitable tolling

(Continued on following page)

applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant's statements or conduct in failing to bring suit. The Court itself has established that it is appropriate to decide a case on tolling grounds, even though it was argued before and decided by the court of appeals as an estoppel case. See *Honda v. Clark*, 386 U.S. 484 (1967). In *Honda*, this Court observed that "[b]oth as the case was treated by the lower courts and as it was largely argued here, the limitations issue has been thought to turn on whether the Government is estopped from asserting the 60-day time bar provided for actions of this kind." *Honda*, 386 U.S. at 486. Although the tolling argument had not been properly raised before the court of appeals, the Supreme Court nevertheless concluded: "Quite apart from any question of governmental estoppel respecting assertion of the statute of limitations . . . we consider that the limitations period was in any event tolled . . . and that petitioners' right to bring their suit was not foreclosed." *Id.* at 494-95. See *Kondo v. Katzenbach*, 356 F.2d 351 (D.C. Cir. 1966), rev'd sub nom. *Honda v. Clark*, 386 U.S. 484 (1967). Regardless of the clarity with which he raised the equitable tolling argument in his briefs, the Seventh Circuit did, in fact, address the question whether there were statutory bar considerations, thereby raising equitable considerations and whether they should toll the limitations period set forth in 8 C.F.R. § 3.2. In *Sagermark v. INS*, 767 F.2d 645 (9th Cir. 1985), the Ninth Circuit dealt with the issue of whether the petitioner exhausted his administrative remedies where it was unclear whether he timely appealed the IJ's decision to the BIA. *Id.* at 648. That court observed that the BIA did, in fact, consider the merits of the IJ's decision and therefore the court ruled the petitioner had exhausted his remedies even if he failed to timely appeal to the BIA. That court wrote, "[w]hether or not the decision on the merits was technically before the BIA, the BIA addressed it thoroughly enough to convince us that the relevant policy concerns underlying the exhaustion requirement – that an administrative agency should have a full opportunity to resolve a controversy or correct its own errors before judicial intervention – have been satisfied here." *Id.* at 648. The Seventh Circuit was aware of the equitable considerations that weighed in Udarbe's favor because Udarbe presented them at oral argument, and court making reference that Udarbe has been in the United States over two decades and one panel member stating that "this isn't a axe murderer . . . You have a misdemeanor conviction in Indiana..I recognize we have all these jurisdiction issues in this case . . . " (http://ca7.org/tmp/L419VOIK.mp3). Udarbe explicitly urged the court to

(Continued on following page)

Since the *Stone* decision, Congress enacted IIRIRA and replaced the old statutory section governing judicial review of deportation and exclusion orders, INA § 106, 8 U.S.C. § 1105a, with a new section governing judicial review of "removal" orders, INA § 242, 8 U.S.C. § 1252.

The Eighth Circuit has held that "[a] motion for reconsideration alleges defects of some sort in the underlying decision by the BIA. Though our review is only for the abuse of discretion, a proper review under the abuse-of-discretion standard of denials of motions for reconsideration ordinarily requires some review of the underlying decision." *Esenwah v. Ashcroft*, 378 F.3d 763, 765 (8th Cir. 2004).

The Fifth Circuit has held that under *Stone*, that court is without jurisdiction to review the BIA's denial of motion to reopen removal proceedings (citing *Stone*, 514 U.S. at 394).

Since the passage of IIRARIA in 1996, however, other circuits have dealt with motions to reopen in a different framework. In so holding, this Court averred that motions for reconsideration are separate, final agency orders, indicating that the proper procedure for appealing both a deportation order and a subsequent denial of a motion for reconsideration is to file two separate petitions for review which may be consolidated for review. *See id.* at 395

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exercise its powers to vacate the decision of the BIA, despite the jurisdictional issues. The BIA in fact, issued the same conclusion in its order denying the motion to reconsider, stating Udarbe "has primarily reiterated the constitutional arguments that were made on appeal. We considered those arguments in adjudicating the respondent's appeal, and find no reason to disturb our prior decision."

("Upon denial of reconsideration, the petitioner would file a separate petition to review that second final order.").

Since the 104th Congress in 1996, however, passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), some circuits addressing motions to reconsider have held that they are no longer regulatory in nature, but statutory. While this Court has not addressed the issue of whether IIRAIRA cases make *Stone v. INS* inapplicable, the Ninth Circuit in *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) has noted that with the enactment of IIRIRA, motions to reopen were transformed from a regulatory to a statutory form of relief. *Id.* at 1283. As the nature of such motions have changed, so too, does the effect of said motions change and therefore the reviewing authority of the court has changed by act of Congress. In *Sidikhouya v. Gonzales* (04-1365, 04-1970, 8th Cir. May 17, 2005), for example, the Eighth Circuit held that motions to reopen afford aliens a statutory right to a determination on the merits, *Id.* at 3, citing *Azarte*, 394 F.3d at 1282. The Court then found that under the BIA's interpretations, the large class of aliens who are granted voluntary departure are "functionally deprived of their statutory right to file a motion to reopen." *Id.*

Timely filed motions to reopen, which assert error in law by the BIA, should be reviewable by federal appellate courts. Other circuits have ruled that motions to reopen are now statutory in nature with the enactment of IIRAIRA. As such, *Stone* should only apply to pre-IIRAIRA cases, not cases wherein the legal effect of motions to reopen fall within the scope of IIRAIRA. With the enactment of IIRIRA, motions to reopen and reconsider are transformed from a regulatory to a statutory form of relief, as correctly interpreted by the Eighth and Ninth Circuits.

Therefore, Petitioner's timely-filed motion for reconsideration, filed within thirty days of the BIA's dismissal, was reviewable by the Seventh Circuit Court of Appeals. While the BIA denied Petitioner's motion to reconsider, the Seventh Circuit Court of Appeals became the Petitioner's only mode of review. It had jurisdiction to review the timely filed petition for review and by failing to do so violated Petitioner's constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for the Petitioner

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued May 2, 2005
Decided May 16, 2005

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 04-2164

NOEL U. UDARBE,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

No. A38-052-399

ORDER

Noel Udarbe, a native and citizen of the Philippines, has been a lawful permanent resident of the United States since his arrival in 1982. In 2001, Udarbe pled guilty and was convicted of battery in Indiana and sentenced to one year in jail. Finding that to be a conviction for an aggravated felony, the INS charged him as removable under 8 U.S.C. § 1227(a)(2)(A)(iii). In the course of the removal proceedings, Udarbe admitted that he had been convicted but claimed that his conviction should not qualify as an aggravated felony. He argued that removing him under

that provision violated his Fifth Amendment rights because if he had been convicted of the same crime in Illinois, the maximum sentence would have been 364 days, meaning that he would not have been convicted of a felony.

The immigration judge found Udarbe removable. Udarbe appealed, again admitting his conviction and sentence but repeating his equal protection argument The Board of Immigration Appeals dismissed Udarbe's appeal, stating that it did not "have the authority to rule on the constitutionality of the Act. . . . " Udarbe filed a motion to reconsider, which the Board also denied. Udarbe appeals that decision, arguing again that his constitutional rights were violated and that the Board erred in determining that it did not have the authority to rule on his constitutional claims.

Unfortunately for Udarbe, we don't have the authority to examine the merits of his constitutional argument, either. On July 19, 2004, we issued an order explaining that, because Udarbe did not file a timely petition for review of the Board's initial decision, this appeal is limited to review of the Board's April 6, 2004, denial of Udarbe's motion to reconsider. In that order, the Board stated simply that Udarbe "failed to show any particular errors of fact or law in our prior decision," noting that Udarbe instead simply repeated constitutional arguments the Board had previously considered.

In this appeal, Udarbe does not dispute the Board's contention that he failed to present any new facts or evidence in his motion for reconsideration. Therefore, we find no error in the Board's order denying Udarbe's motion for reconsideration. And, as we explained in our July 19 order, our review is limited to that decision, so we do not

have jurisdiction to consider Udarbe's claim that the Board erred in its initial decision not to consider Udarbe's constitutional arguments. The petition to review the denial of the petition for reconsideration is therefore DENIED.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A38 052 399 – Chicago Date: APR – 6 2004

In re: NOEL URIAS UDARBE

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reconsideration

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated February 20, 2004. We find that the respondent has failed to show any particular errors of fact or law in our prior decision. *See* 8 C.F.R. § 1003.2(b). Instead, the respondent has primarily reiterated the constitutional arguments that were made on appeal. We considered these arguments in adjudicating the respondent's appeal, and find no reason to disturb our prior decision. Accordingly, the motion to reconsider is denied.

/s/ [Illegible]
FOR THE BOARD

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A38 052 399 – Chicago Date: FEB 20 2004

In re: NOEL URIAS UDARBE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
John J. Muldoon, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony as defined in section 101(a)(43)(F) of the Act

APPLICATION: Termination

In a decision dated September 24, 2002, an Immigration Judge found the respondent removable as charged, that he did not establish eligibility for any form of relief from removal, and ordered him removed to the Philippines. The respondent has filed this appeal, which is opposed to by the Department of Homeland Security (formerly the Immigration and Naturalization Service). The appeal will be dismissed.

On appeal, the respondent concedes that his conviction for battery is a crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). His argument is that the Act violates the Equal Protection Clause because a similar conviction in another state might not support removability.

Neither this Board nor the Immigration Judges have the authority to rule on the constitutionality of the Act and the regulations we administer. *See Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997). The appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Immigration and Naturalization Service **Notice to Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act

In the Matter of: Filed No: A 38 052 399

Inmate Number: _____

Respondent: Noel Urias UDARBE aka _____
currently residing at:

4555 W. 58th Street Chicago, IL 60629
(Number, street, city, state and ZIP code)

_____
(Area code and phone number)

☐ You are an arriving alien.

☐ You are an alien present in the United States who has not been admitted or paroled.

☑ You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that:

1. You are not a citizen or national of the United States.

2. You are a native of PHILIPPINES and a citizen of PHILIPPINES ;

3. You entered the United States at or near Chicago, Illinois , on or about October 05, 1982 ;

4. At that time, you were admitted as an immigrant, class of admission P-11.

5. You were, on November 9, 2001, convicted in the Lake County Superior Court, State of Indiana, for the offense of Battery, for which a sentence of 1 year was imposed.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to:
☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

55 East Monroe Street, Suite 1900; Chicago, Illinois 60603
(Complete Address of Immigration Court, Including Room Number, if any)

on To Be Set (Date) at To Be Set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

/s/ [Illegible] Assist. Officer in Charge
(Signature and Title of Issuing Officer)

Date: April 12, 2002 Indianapolis, Indiana 46204
(City and State)

EXHIBIT: 1
DATE: 1/9/02
IJ CODE: [illegible mark]

Form I-862 (Rev. 4-1-97)

See reverse for important information

WARNING: Any statement you make may be used against you in removal proceeding

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review. Unless you so request, no hearing will be scheduled earlier than ten days form the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the tesimony [sic] of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the

Government. At the conclusion of the hearing, you have a right to appeal an adverse decision of the Immigration Judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to Appear You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during the proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10 day period prior to appearing before an immigration judge.

_____
(Signature of respondent)

Before:

_____
(Signature and title of INS officer) Date _____

Certificate of Service

This Notice to Appear was served on the respondent by me on 9/25/02, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☐ in person ☑ by certified mail, return receipt requested
☐ by regular mail

☑ A list of providers of free legal services has been given to the respondent

☐ The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____ /s/ Mark Summons SA
(Signature of respondents if personally served) (Signature and title of officer)

IMMIGRATION COURT
55 EAST MONROE STREET, STE. 1900
CHICAGO, IL 60603

In the Matter of: Case A 38-052-399

John J. Muldoon IN REMOVAL PROCEEDINGS

Respondent

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 9-24-02. This memorandum [sic] solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral vision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to Philippines.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding/deferral of removal under Article 3 of the U.N. Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under Section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for adjustment of status under Section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be Issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[✓] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: 9-24-02

/s/ Craig M. Zerbe
Craig M. Zerbe
Immigration Judge

APPEAL: Reserved/Waived (Alien/INS/Both)

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( ) 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years after the date of entry of the final order of removal.

( ) 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years from the date of your scheduled hearing.

( ) 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for ten (10) years from the date of the scheduled departure. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

(✓) 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (See Section A. Below) for ten (10) years after the date you are scheduled to appear.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE:

1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date: 9/24/02

Immigration Judge: [Illegible]

or Court Clerk: _____

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[✓] ALIEN'S ATT/REP [ ] INS

DATE: 9/24/02 BY: COURT STAFF [Illegible]

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File A 38 052 399

In the Matter of

NOEL URIAS UDARBE,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 237(a)(2)(A)(iii) through 101(a)(43)(f) of the Act.

APPLICATION: Termination,

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
John J. Muldoon, Esquire	Stan Gonsalves, Esquire Assistant District Counsel, INS

DECISION OF THE IMMIGRATION JUDGE

The respondent is a male. He's a native and citizen of the Philippines. He arrived in the United States on October 5th, 1982 and was admitted as an immigrant.

On May 23rd, 2002, the Immigration Service issued a Notice to Appear charging the respondent with violating Section 237(a)(2)(A)(iii) through 101(a)(43)(f) of the Act. A hearing on July 9th, 2002, the respondent pled to the allegations admitting the five allegations in the Notice to Appear. The pertinent part [sic] those allegations charge the respondent with not being a United States citizen, with having been admitted as a permanent resident on

October 5th, 1982, and with having been convicted of the offense of battery on November 9th, 2001.

The respondent's contention is that he was not convicted of an aggravated felony under Section 101(a)(43)(f) for the following reasons. First, that the respondent "is not being treated equally as a person similarly situated in the state of Illinois insofar as that crime under Illinois criminal law would require a sentence of less than 365 days", and consequently his rights under the 5th Amendment of the Constitution and due process laws of the Constitution, are being violated.

Having reviewed the conviction records (see Exhibit 2), I've concluded that the respondent has been convicted of a crime constituting an aggravated felony for the following reasons. First, a determination of whether the respondent has been convicted of an aggravated felony is made with reference to the crime. The nature of the offense is indicated in the state statute. In addition, with reference to the elements of that statute under the applicable law of that state, in this case the applicable law is the state of Indiana, shows that the respondent was convicted of battery. In addition, the penalty for battery and his sentence as provided by the Court was 365 days incarceration. The order by the Court (see Exhibit 2) provides the respondent has jail time credit that exceeds one year and therefore has satisfied the one year sentence imposed by the Court. Clearly the respondent received a one year jail term.

Even assuming arguendo that there are some batteries which would not constitute crimes of violence and those which do, in this case, assuming that is, the statute is divisible, and resolution of this question of whether the

respondent has been convicted of a crime of violence can be made with reference to the conviction record. The conviction record indicates the respondent was found guilty of an unwarranted touching of an individual after being charged in a multiple count indictment with a number of offenses. I've concluded that the respondent's conviction falls within a crime of violence insofar as it involves the threatened use of physical force against the person of another. The crime as described in the conviction record indicates that the respondent used physical force in order to perpetrate essentially a sexual offense on his victim. Consequently, I've concluded that the respondent has been convicted of a crime of violence and therefore an aggravated felony under 101(a)(43)(f) of the Act.

Having concluded that the respondent has been convicted of a crime of violence, an aggravated felony, I must consider whether he's seeking any relief. The respondent has not requested any relief and more importantly, does not appear to be eligible for any relief. First, the respondent has not sought any. Secondly, he's not eligible for cancellation of removal for permanent residents, for political asylum, or for voluntary departure. When asked whether he wished to apply for any relief, his attorney stated only that he wished to appeal. Consequently, the Court will direct removal to the Philippines.[1] Accordingly, the following order is entered:

---

[1] This is not a case where responsibility to designate a country of removal expresses or implies that he fears returning to the Philippines. He has made no claim of persecution which would qualify him for protection under the Torture Convention, or for withholding of removal.

IT IS ORDERED that the respondent be removed to the Philippines.

/s/ Craig Zerbe
CRAIG ZERBE
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Board of Immigration Appeals

Matter of	)	File: A 38 0652 399
NOEL URIAS UDARBE,	)	
	)	
Respondent.	)	

PETITIONER'S MOTION TO RECONSIDER
THE DECISION TO DISMISS HIS APPEAL

NOW COMES the Petitioner, NOEL URIAS UDARBE, by his attorney, John J. Muldoon, and in support of his Motion to Reconsider the Decision to Dismiss His Appeal, states as follows:

1. The Immigration and Naturalization Service ("INS") began proceedings to remove Petitioner, NOEL URIAS UDARBE, ("Petitioner") pursuant to 8 U.S.C. § 1101(a)(43) (the "Act.")

2. The INS claimed that Petitioner is removable pursuant to 8 U.S.C. § 1101(a)(43) on the basis of his conviction on a misdemeanor battery charge on or about November 9, 2001, in the Superior Court of Lake County, Criminal Division, Crown Point, Indiana under Case Number 45G01-9901-CF-00016 as it constituted an "aggravated felony" as defined by 8 U.S.C. § 1101(a)(43).

3. However, Petitioner asserted that the application of 8 U.S.C. § 1101(a)(43) to his misdemeanor conviction for the offense of battery in the State of Indiana violated his Equal Protection rights as guaranteed by the due process clause of the Fifth Amendment of the Constitution of the United States because the terms of imprisonment for misdemeanor battery convictions vary from state to state

and that if Petitioner were convicted for the same actions under a misdemeanor offense of battery in another state (such as the State of Illinois) and received the maximum sentence, as he did in the State of Indiana, his conviction would NOT be an aggravated felony under the Act and he would NOT be subject to removal by the INS.

4. On February 20, 2004 the Board of Immigration Appeals issued a written decision denying Petitioner's appeal stating that it did not have "the authority to rule on the constitutionality of the Act."

5. The Board in support of its decision cited *Matter of Fuentes-Campos*, 21 I&N Dec. 915 (BIA 1997.)

6. A close reading of the *Fuentes-Campos* reveals the U.S. Supreme Court's recognition of the canon that "statutory interpretation stating that constructions of doubtful constitutional validity should be avoided where possible," citing *United States v. Witkovich*, 353 U.S. 194, 199 (1957)

7. However in the *Fuentes-Campos* case the board found it unnecessary to resort to the canon as it found no ambiguity in section 440(d); the act at issue.

8. Conversely a construction of "doubtful constitutional validity" does exist in the board's interpretation in the case at bar.

9. The INS is attempting to remove petitioner by defining his misdemeanor conviction as an "aggravated felony."

10. There is an obvious difference between a misdemeanor and an aggravated felony.

11. It is doubtful that a statute that mandates removal on the basis of an "aggravated felony" should be used to remove a person who has been convicted of a mere misdemeanor.

12. The canon cited by the U.S. Supreme Court in *Witkovich* mandates that the board interpret the Act to avoid the "doubtful constitutional validity" created by the INS treating a person convicted of misdemeanor battery in the State of Indiana differently than a person convicted of misdemeanor battery in the State of Illinois.

13. Because the INS interprets the Act to allow the unequal treatment for the same course of conduct from one state to another, without a rational basis for such unequal treatment; the INS' interpretation violates Petitioner's rights to equal protection under the due process clause of the Fifth Amendment of the United States Constitution.

WHEREFORE, for all the foregoing reasons, this board must follow the canon to avoid the construction of doubtful constitutional validity of the Act and dismiss the INS removal proceedings against Petitioner.

Respectfully Submitted,

/s/ John J. Muldoon
John J. Muldoon

John J. Muldoon
105 W. Madison Street, Suite 900
Chicago, IL 60603
312-726-0324

FOR PUBLICATION

ATTORNEY FOR APPELLANT:	ATTORNEYS FOR APPELLEE
MARCE GONZALEZ, JR. Merrillville, Indiana	**STEVE CARTER** Attorney General of Indiana **NANDITA G. SHEPHERD** Deputy Attorney General Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NOEL UDARBE, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)))))))	No. 45A03-0010-CR-373

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Richard W. Maroc, Judge
Cause No. 45G01-9901-CF-16

May 8, 2001

OPINION – FOR PUBLICATION

KIRSCH, Judge

Noel Udarbe appeals his conviction of attempted criminal deviate conduct,[1] a Class B felony, contending

[1] *See* IC 35-42-4-2; IC 35-41-5-1.

that the trial court erred in admitting uncharged sexual misconduct evidence when his intent was not placed at issue. We agree and reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment show that in July 1996, Maria Baclao, a Philippino on a working visa, worked as a visiting nurse at Gentlepro Health Home Services. Udarbe was Baclao's supervisor. Udarbe first sexually assaulted Baclao at work sometime between March and April 1998. At the time of the assault, Udarbe grabbed Baclao while she was working in the supply room and pinned her against a metal rack and caressed her buttocks and kissed her neck and face. Other similar sexual assaults followed. Baclao reported the incidents to Gentlepro's main office and to the police in October 1998. Udarbe was later arrested, charged, and subsequently convicted.

At trial, over his objection, the State was permitted to introduce the testimony of Revlon Villacin, a former employee of Gentlepro, that she too had been sexually assaulted by Udarbe. Udarbe now appeals the trial court's admission of this evidence.

DISCUSSION AND DECISION

Udarbe asserts that the trial court erred in admitting evidence of prior uncharged sexual misconduct at his trial. Specifically, Udarbe claims that the trial court erroneously determined pursuant to Indiana Evidence Rule 404(b) that intent was made an issue based upon his opening statement and trial testimony. He maintains that both in his

opening statement and in his trial testimony he denied touching Baclao in a sexual manner. Udarbe contends that he completely denied that the charged acts occurred and accordingly claims that his intent was never placed at issue.

The evidentiary rulings of a trial court are afforded great deference and are reversed on appeal only upon a showing of an abuse of discretion. *Herrera v. State*, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999). Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" Rule 404(b) "is designed to prevent the jury from making the 'forbidden inference' that prior wrongful conduct suggests present guilt." *Byers v. State*, 709 N.E.2d 1024, 1026-27 (Ind. 1999).

The standard for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evid. Rule 403. *Boone v. State*, 728 N.E.2d 135, 137-38 (Ind. 2000); *Hicks v. State*, 690 N.E.2d 215, 221 (Ind. 1997). The evidence is inadmissible when the State offers it only to produce the "forbidden inference" that the defendant has engaged in other, uncharged misconduct and the charged conduct was in conformity with the uncharged misconduct. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000) (citing *Hicks*, 690 N.E.2d at 219.) The

trial court has wide latitude in balancing the probative value of the evidence against the possible prejudice of its admission and its ruling will only be reviewed for an abuse of discretion. *Crain*, 736 N.E.2d at 1235.

The intent exception to Rule 404(b) is available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of contrary intent, whether in opening statement, cross-examination, or presentation of his own case-in-chief. *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). In *Wickizer*, our supreme court explained:

> "Mindful of the variety of judicial perspectives regarding the proper role of prior conduct evidence in the ascertainment of truth, we conclude that Indiana is best served by a narrow construction of the intent exception in Evid. R. 404(b). It does not authorize the general use of prior conduct evidence as proof of the general or specific intent element in criminal offenses. To allow the introduction of prior conduct evidence upon this basis would be to permit the intent exception to routinely overcome the rule's otherwise emphatic prohibition against the admissibility of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. In this context, admission of prior bad acts would frequently produce the 'forbidden inference' cautioned against in *Hardin [v. State]*, 611 N.E.2d [123,]129 [(Ind. 1993)].
>
> The intent exception in Evid. R. 404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent. When a defendant alleges in trial a particular contrary intent, whether in opening

> statement, by cross-examination of the State's witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense. The trial court must then determine whether to admit or exclude such evidence depending upon whether 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.' Evid. R. 403."

Id. Applying this rule, the court reversed Wickizer's conviction for child molestation after determining that his pre-trial statement to the police that he was not a "devious character" did not constitute the "assertion of a particular contrary intent so as to permit the State to utilize the intent exception of Evid. R. 404(b) to present prior conduct testimony." *Id.* at 800.

In *Cook v. State*, 734 N.E.2d 563, 569 (Ind. 2000), our supreme court also determined that the trial court erred in admitting into evidence in a murder trial the fact that defendant, apparently unprovoked, punched another person in the face a few hours before the murder. On appeal, the court rejected the State's theory that the evidence was admissible pursuant to Rule 404(b)'s intent exception: "Although couching its argument in terms of state of mind, it is apparent the State sought to introduce the evidence for the purpose of demonstrating that because Cook had acted violently in the recent past, he likely acted in conformity therewith and shot the victim in this case. This is the forbidden inference that 404(b) specifically prohibits." *Id.*

Additionally, in *Sundling v. State*, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997), we reversed defendant's three child molestation convictions finding that the trial court abused its discretion in admitting evidence of the defendant's prior uncharged molestations where "[q]uite simply, Sundling's defense was that the molestations never occurred." We further noted that none of the exceptions listed in Rule 404(b) were in genuine dispute and that the State did not claim that the uncharged sexual misconduct was admissible under any of these exceptions. *See also Sloan v. State*, 654 N.E.2d 797, 802 (Ind. Ct. App. 1995), *trans. denied, abrogated on other grounds by Hicks v. State*, 690 N.E.2d 215 (Ind. 1997) (noting that defendant's motive and intent were not placed at issue in child molestation case, and thus did not justify admitting defendant's prior bad acts).

Unlike other cases in which the defendant specifically advanced a claim of contrary intent, a review of the record reveals that Udarbe did not place his intent in issue. *See e.g., Boone*, 728 N.E.2d at 138 (State allowed to present evidence establishing that defendant's intent was to inflict fatal harm when defendant advanced defense of sudden heat); *Evans v. State*, 727 N.E.2d 1072, 1080 (Ind. 2000) (in murder trial, evidence of uncharged misconduct evidence properly admitted where "[d]efendant went beyond merely denying the charged culpability and affirmatively presented a claim of particular contrary intent – self defense"); *Johnson v. State*, 722 N.E.2d 382, 384 (Ind. Ct. App. 2000) (defendant placed intent at issue in rape case by alleging that victim had engaged in consensual sexual intercourse); *Roche v. State*, 699 N.E.2d 752, 754 (Ind. Ct. App. 1998) (defendant's intent placed at issue in case of attempted murder of a prison guard where defendant

alleged his intent in shooting guard was not to kill the guard, but instead to gain time to effect a prison escape). In *Sundling*, 679 N.E.2d at 993, we wrote that:

> "[T]o introduce extraneous bad acts, the proponent of the evidence must articulate a rational and legitimate connection between the evidence and some matter actually at issue in the case. Where the proponent is unable to demonstrate such a connection, it is likely that none exists and the true purpose of the evidence was the forbidden one of proving the accused's bad character."

Here, throughout the trial, Udarbe denied the charged acts and did not present a claim of particular contrary intent. Udarbe maintained his innocence during the entire trial. Consequently, his intent was not at issue so as to justify the admission of prior uncharged acts under the intent exception to Rule 404(b).

The State contends that the evidence of prior misconduct with Villacin was not introduced as proof of intent, but instead to rebut the specific factual claims raised by Udarbe, namely that Baclao was a problem employee and that she was upset because Udarbe rejected her advances. In support of this contention, the State relies upon *Koo v. State*, 640 N.E.2d 95, 101-02 (Ind. Ct. App. 1994), *trans. denied* (1995), in which a panel of this court held that prior bad act evidence may be admitted by the State to rebut a specific factual claim raised by the defendant.

In *Koo*, during his rape trial, the defendant presented "substantial evidence" during opening statement, direct examination of witnesses, and cross-examination of the State's witnesses suggesting that the rape victim had hallucinated the sexual encounter due to her drug use. *Id.*

at 101. To refute this specific factual claim, the State was allowed to introduce the testimony of two witnesses that defendant had previously raped them. In upholding the trial court's ruling we, in part, relied upon *U.S. v. Beltempo*, 675 F.2d 472 (2nd Cir. 1982), *cert. denied*, 457 U.S. 1135 (1982), where the court admitted prior bad act evidence to rebut a factual claim by the defendant. The following was our interpretation of the case:

> "In that case, defendants were on trial for conspiring to import heroin into the United States from Italy. The prosecution admitted evidence that one of the defendants, Giuseppe Gallina, had deposited a check for $20,000 three years before the crime at issue was committed. On appeal, Gallina contended that this evidence tended to show the commission of a prior criminal act. The court upheld the admission of the evidence because it tended to rebut the defense's claim that Gallina was a poverty-stricken butcher who traveled to Italy occasionally for health reasons."

Koo, 640 N.E.2d at 101.

Here, not only did Udarbe not present substantial evidence to support a specific factual claim, but Villacin's testimony does not rebut the claims which the State alleges that Udarbe presented. The State claims that Udarbe placed in issue the specific factual claims that Baclao's job performance was poor and that she was upset that Udarbe had rejected her. Accordingly, the State maintains that it was properly allowed to rebut these factual claims with evidence of Udarbe's prior sexual misconduct with Villacin. However, unlike the facts in *Koo* and *Beltempo*, the State's introduction of Villacin's testimony does not rebut Udarbe's claims that Baclao was a

poor employee and angered by his rejection. To the contrary, Villacin was permitted to go beyond these allegations and testify in detail about previously being sexually assaulted by Udarbe. The prior sexual misconduct evidence does not rebut Udarbe's claims.

The State's true purpose in admitting the evidence was to prove the "forbidden inference" of demonstrating Udarbe's propensity to commit the charged act. Accordingly, we conclude that pursuant to the intent exception specifically enumerated in Rule 404(b) the admission of Villacin's testimony was an abuse of discretion.

Our analysis does not end with the finding of error in the admission of this evidence because we must also examine the prejudicial impact of such evidence. An error in the admission of evidence does not justify setting aside a conviction unless the erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. *Wickizer*, 626 N.E.2d at 800 (citing Ind. Trial Rule 61). Such error is harmless when substantial independent evidence of guilt supports the conviction such that the reviewing court is satisfied that the erroneous admission of evidence played no role in the conviction. *Sundling*, 679 N.E.2d at 994. However, reversal is mandated when the record reveals that the improperly admitted evidence likely had a prejudicial impact on the average juror such that it contributed to the verdict. *Id.* Here, we conclude that Villacin's testimony likely substantially swayed the jury so as to have contributed to the conviction. A review of the record establishes that the only evidence of Udarbe's guilt came from Baclao, the victim of the sexual assault. Substantial independent evidence of Udarbe's guilt was not presented by the State.

Accordingly, the admission of the prior sexual misconduct was not harmless error.

The trial court abused its discretion in admitting evidence of the alleged prior sexual misconduct with Villacin.

Reversed and remanded for a new trial.

SHARPNACK, C.J., and MATTINGLY-MAY, J., concur.

Information Maintained by the Office of Code Revision Indiana Legislative Services Agency

IC 35-42-2-1 Version a
Battery

Note: This version of section amended by P.L.175-2003, SEC.2. See also following version of this section amended by P.L.281-2003, SEC.3.

Sec. 1. (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if:

(A) it results in bodily injury to any other person;

(B) it is committed against a law enforcement officer or against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty;

(C) it is committed against an employee of a penal facility or a juvenile detention facility (as defined in IC 31-9-2-71) while the employee is engaged in the execution of the employee's official duty;

(D) it is committed against a firefighter (as defined in IC 9-18-34-1) while the firefighter is engaged in the execution of the firefighter's official duty; or

(E) it is committed against a community policing volunteer.

(i) while the volunteer is performing the duties described in IC 35-41-1-4.7; or

(ii) because the person is a community policing volunteer;

(2) a Class D felony if it results in bodily injury to:

(A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of his official duty;

(B) a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;

(C) a person of any age who is mentally or physically disabled and is committed by a person having the care of the mentally or physically disabled person, whether the care is assumed voluntarily or because of a legal obligation;

(D) the other person and the person who commits the battery was previously convicted of a battery in which the victim was the other person;

(E) an endangered adult (as defined in IC 12-10-3-2);

(F) an employee of the department of correction while the employee is engaged in the execution of the employee's official duty;

(G) an employee of a school corporation while the employee is engaged in the execution of the employee's official duty;

(H) a correctional professional while the correctional professional is engaged in the execution of the correctional professional's official duty;

(I) a person who is a health care provider (as defined in IC 16-18-2-163) while the health care provider is engaged in the execution of the health care provider's official duty;

(J) an employee of a penal facility or a juvenile detention facility (as defined in IC 31-9-2-71) while the employee is engaged in the execution of the employee's official duty;

(K) a firefighter (as defined in IC 9-18-34-1) while the firefighter is engaged in the execution of the firefighter's official duty; or

(L) a community policing volunteer:

(i) while the volunteer is performing the duties described in IC 35-41-1-4.7; or

(ii) because the person is a community policing volunteer;

(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;

(4) a Class B felony if it results in serious bodily injury to a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;

(5) a Class A felony if it results in the death of a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age;

(6) a Class C felony if it results in serious bodily injury to an endangered adult (as defined in IC 12-10-3-2); and

(7) a Class B felony if it results in the death of an endangered adult (as defined in IC 12-10-3-2).

(b) For purposes of this section:

(1) "law enforcement officer" includes an alcoholic beverage enforcement officer; and

(2) "correctional professional" means a:

(A) probation officer;

(B) parole officer;

(C) community corrections worker; or

(D) home detention officer.